

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 \* \* \*

4 United States of America,

Case No. 2:20-cr-00295-JCM-EJY

5 Plaintiff,

**Order re ECF No. 100**

6 v.

7 Joshua Cola,

8 Defendant.

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10 This matter is before the Court on revocation proceedings. The issue is whether Defendant  
11 Joshua Cola, who has been arrested (and detained) on a separate criminal charge, has a right to a  
12 preliminary hearing so that the Court can determine whether there is probable cause that Mr. Cola  
13 violated his conditions of supervised release as alleged at ECF No. [90]. The Government filed a  
14 Motion to Vacate Preliminary Hearing (ECF No. 100), and Mr. Cola opposed (ECF No. 102).

15 Fed. R. Crim. P. 32.1 provides that a person facing revocation proceedings is entitled to  
16 receive three separate hearings: (1) an initial appearance, (2) a preliminary hearing, and (3) a  
17 revocation hearing. *See also Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (“[W]e hold that a  
18 probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the  
19 conditions specified in *Morrissey v. Brewer*, 408 U.S. 471 (1972) . . . .”). But “Rule 32.1’s  
20 preliminary-hearing provisions are inapplicable when a revocation proceeding is initiated against  
21 a defendant who is already in custody on separate criminal charges . . . .” *United States v. Vasquez-*  
*Perez*, 742 F.3d 896, 899 (9th Cir. 2014).

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23 Here, because Mr. Cola has been detained on another matter (2:22-cr-00263-JCM-NJK),  
24 there is no immediate deprivation of liberty as a result of revocation proceedings, and the Rule  
25 32.1(b)(1)(A) requirement for a preliminary hearing does not apply. *Vasquez-Perez*, 742 F.3d at  
26 899; *see also United States v. Flores-Perez*, No. 07CR1477-L, 2010 WL 1328580, at \*2 (S.D. Cal.  
27 Apr. 1, 2010) (“[I]t is well settled law in the Ninth Circuit that a probationer is not entitled to a  
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1 preliminary hearing when he is already in custody at the time of revocation proceedings for a crime  
2 committed while he was under supervision.”).

3 The Court understands Mr. Cola’s position to be that a preliminary hearing is not required  
4 *only* where the defendant has been *convicted* or *sentenced* in another matter or where such a  
5 conviction was imminent. ECF No. 102 at 5–7. Mr. Cola is correct in asserting that there is no  
6 need for a preliminary hearing for a parole or probation violation where an individual has been  
7 convicted of a subsequent offense because there is no immediate deprivation of liberty. *Moody v.*  
8 *Daggett*, 429 U.S. 78, 86 (1976). However, he is incorrect in limiting this reasoning to only those  
9 instances where a conviction or sentencing has taken place. This is because the Ninth Circuit has  
10 held that where, as here, a preliminary hearing for a parole or probation violation is unnecessary  
11 if he is being detained on separate charges because there is no immediate deprivation of liberty.  
12 See *United States v. Diaz-Burgos*, 601 F.2d 983, 984–85 (9th Cir. 1979) (per curiam) (no  
13 preliminary probable cause hearing required when, at time of revocation proceeding, defendant  
14 was already in custody because of another prosecution).

15 **IT IS THEREFORE ORDERED** that the Government’s Motion to Vacate Preliminary  
16 Hearing (ECF No. 100) is GRANTED.

17 **IT IS FURTHER ORDERED** that the preliminary hearing set for December 6, 2022 is  
18 VACATED.

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20 DATED: December 6, 2022.

21   
22 BRENDAG WEKSLER  
23 UNITED STATES MAGISTRATE JUDGE  
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